HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY

Writ Petition No.2402 of 2002

Dated: 23rd November, 2005

Between:

Sayam Suresh, S/o.Madhav, R/o.Thatpally village,

Koutala Mandal, Adilabad District.

..... PETITIONER

AND

1. Tangda Sudhakar, S/o.Donu, R/o.Thatpally village,

Koutala Mandal, Adilabad District and others.

.....RESPONDENTS

HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY

Writ Petition No. 2402 of 2002

ORDER:

The unsuccessful 1st respondent in O.P.No.2 of 2001 on the file of the Junior Civil Judge-cum-Election Tribunal, Sirpur, Adilabad District, whereby his election as Sarpanch of Thatpally Gram Panchayat has been set aside and instead the petitioner in the O.P. has been declared as elected, filed this writ petition seeking to declare the order dated 25.01.2002 passed in the said O.P. as illegal and arbitrary.

2. The facts of the case giving raise to file this writ petition by Sayam Suresh, in brief, are: The petitioner-Sayam Suresh, R-1-Tangda Sudhakar and R-2-Naitham Babu Rao contested for the post of Sarpanch, Thatpally Gram Panchayat. Election was held on 14.08.2001. Sayam Suresh was declared as

elected having secured 416 votes and whereas Tangda Sudhakar secured 409 votes and thereby stood in second position. Tangda Sudhakar filed O.P.No.2 of 2001 on the file of the Junior Civil Judge-cum-Election Tribunal, Sirpur, to set aside the election of Sayam Suresh (petitioner herein) and instead declare him as duly elected. Various contentions have been raised as grounds to set aside the election of Sayam Suresh as Sarpanch of Thatpally Gram Panchayat. Sayam Suresh filed counter resisting the said petition. Tangda Sudhakar has got himself examined as P.W.1, whereas Sayam Suresh has got himself examined as R.W.1 in support of their respective contentions. The learned Junior Civil Judge-cum-Election Tribunal, Sirpur, on considering the material on record and on hearing the counsel for both the parties, ordered for recounting of the votes by order dated 06.12.2001. Para.6 of the order reads as follows:

> "6. Though the respondent categorically denied the allegations made in the evidence of PW-1, but the election process should be transparent and both successful candidate and defeated candidate must satisfy that the real justice has been done. It is required not only to do justice, but also it should appear to be justice. Hence, I do not feel any impediment to order a fair recounting in the presence of both parties and their counsel before this tribunal. Hence, this point is answered in favour of the petitioner.
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> 7. In the result, the petition is allowed directing the office to send for the election material preserved and on receipt of the election material put up this record to give a date for scrutiny and recounting of the votes."

In pursuance of the directions of the Tribunal, entire election material came to be forwarded and thereupon the Tribunal took up recounting. In the recounting, petitioner-Tangda Sudhakar secured more number of votes than Sayam Suresh-writ petitioner and thereby he was declared as elected by Order dated 25.01.2002. Para.2 of the Order dated 25.01.2002 reads as follows:

> "Now after effecting all the changes the rejected votes Seven is added with one from the petitioner's count and three from R-1's count became '11'. The R-1's votes are 416 and out of them seven votes are given to the petitioner's count and three votes are the rejected votes and the remaining will be only 406 for R-1. The petitioner who got 409 votes in the original counting lost one vote towards rejected vote and gained seven votes from R-1's votes and became 415 votes holder, as such he got an absolute majority with nine clear votes against the successful candidate i.e., R-1. Accordingly, the result is tilted in favour of the petitioner."

Assailing the Order dated 25.01.2002 passed in O.P.No.2 of 2001, Sayam Suresh has filed this writ petition.

3. Heard learned counsel appearing for the petitioner and learned counsel appearing for the first respondent.

4. Learned counsel appearing for the petitioner submits that the Election Tribunal has not recorded any reasons for recounting of the votes in the order impugned in the writ petition and thus, the same is liable to be set aside. To buttress his submissions, reliance has been placed on the judgments of the Supreme Court in ***Vadivelu v. Sundaram and others*** and ***Mahender Pratap v. Krishan Pal and others***. In ***Vadivelu v. Sundaram and others*** (1st supra) it has been held that recounting cannot be ordered on the basis of general and bald allegations and petitioner seeking recount should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. In ***Mahender Pratap v. Krishan Pal and others*** (2nd supra) it has been held that high standard of proof of grounds is required for setting aside the election. Learned counsel appearing for the petitioner laid much emphasis on para.18 of the said judgment and it is thus:

> "18. For making out a ground for re-count being granted, if intentional false averment is made in an election petition and the said averment is duly verified to be true as provided under Section 83 of the Act then such election petition could be rejected by the court. In *Mahant Ram Prakash Dass v. Ramesh Chandra* [(1999) 9 SCC 420] considering the contention of irregularity in counting, the Court held thus: (SCC pp. 427-28, para.13)
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> "13. A candidate or his agent has an opportunity to ask for re-count at two stages: the first, before election result is finally declared, and the second, by way of election petition before the High Court. An application under Rule 63(2) of the Conduct of Elections Rules is to be given immediately after the votes secured by each of the candidates is announced under Rule 63(1), but such an application cannot be given after the candidate is declared elected under Rule 64. If an application is made under Rule 63(2) the Returning Officer shall decide the matter either by allowing the application in whole or in part or may reject it in its entirety, if it appears to him to be frivolous or unreasonable. The decision shall be in writing containing reasons therefor.

> The application for re-count should contain valid precise grounds on which the re-count is asked for. When the rules provide for enough opportunity to a candidate or his agent to watch the counting process before the result is declared and if an objection is raised as to the validity of any ballot paper and if such objection is rejected improperly, it would afford a basis for re-count in an election petition. The secrecy of the vote has to be maintained and demand for re-count should not ordinarily be granted unless the election petitioner makes out a prima facie case with regard to error in counting of such magnitude that the result of the election of the returned candidate may be affected. Smallness of the victory margin by itself may not be a sufficient ground for re-count. However, if a prima facie case is made out as to error in counting, a small margin by which the returned candidate succeeded in the election assumes significance, inviting re-count."

5. Learned counsel appearing for the 1st respondent submits that the petitioner cannot question the impugned order having allowed the order passed by the Election Tribunal on 06.12.2001 to reach finality. He further submits that the recounting has been done in the presence of both the parties and in pursuance of the memo filed by both the parties and thus, the petitioner cannot be permitted to dispute the recounting of votes. He refers the memo dated 27.11.2001 filed by both the parties in O.P.No.2 of 2001 by placing copy of which on record. The memo reads as follows:

> "The petitioner and the respondents have no objection for recounting of votes in the above petition.
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> Hence, this joint memo."

He also placed reliance on the judgment of the Supreme Court in ***T.A.Ahammed Kabeer v. A.A.Azeez and others***, wherein it has been held as follows:

> "It is true that a recount is not be ordered merely for the asking or merely because the Court is inclined to hold a recount. In order to protect the secrecy of ballots the Court would permit a recount only upon a clear case in that regard having been made out. To permit or not to permit a recount is a question involving jurisdiction of the Court. Once a recount has been allowed the Court cannot shut its eyes on the result of recount on the ground that the result of recount as found is at variance with the pleadings. Once the Court has permitted recount within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the recount which has to be given

effect to."

6. The petitioner was declared as elected and his election was questioned by the first respondent herein by filing O.P.No.2 of 2001 on the file of the Junior Civil Judge-cum-Election Tribunal, Sirpur. The Election Tribunal after going through the evidence brought on record, on considering the material and on hearing the counsel for both the parties, passed order dated 06.12.2001, whereby recounting was ordered. The petitioner did not choose to question the order dated 06.12.2001 passed by the Election Tribunal and thereby allowed the order to reach finality. The order impugned in the writ petition is a consequential order. After summoning the election material, the learned Junior Civil Judge proceeded to recount the votes in the presence of both the parties as well as their counsel. On going through the impugned order, I do not see any valid ground to find fault with the method followed in the recounting of votes. Accordingly, I find that the writ petition is devoid of merits and is liable to be dismissed.

7. Accordingly, the writ petition is dismissed. No costs.

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B.SESHASAYANA REDDY, J.

Date: 23rd November, 2005.

Note:

Issue C.C. within a week.

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